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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1331

CLAYTON P. KEHOE TOWING COMPANY, INC., a corporation and MARTIN J. KEHOE TOWING COMPANY, INC., a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA and TANKER HYGRADE NO. 18, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition of third-party defendants, Clayton P. Kehoe Towing Company, Inc. and Martin J. Kehoe Towing Company, Inc., by their attorney, Robert P. Whelan, for writ of certiorari to the Supreme Court of the United States, respectfully shows:

1. (a) The unofficial report of the opinion delivered in the United States Court of Claims below is 526 F.2d 805 (decided December 17, 1975).

1. (b)(i) The order sought to be reviewed was entered in the United States Court of Claims on December 17, 1975.

1. (b)(ii) There was no order respecting a rehearing.

1. (b)(iii) Jurisdiction herein to review the order in question is conferred by 28 U.S.C. 1255(1).

1. (c) The questions presented for review on the instant petition are:

1. Whether the United States can implead a third-party defendant in the Court of Claims for a contingent liability in tort.

2. Whether such a third-party defendant, if it can be so impleaded, can be deprived of its constitutional right to trial by jury on such a tort claim.

3. Whether the Federal Water Quality Improvement Act contemplated a claim such as that of plaintiff herein against the United States in the Court of Claims.

1. (d) The statutes and regulations involved are Chapter 91 of Title 28, U.S.C. concerning the jurisdiction of the Court of Claims, Rule 41, of said Court of Claims rules thereunder, the Seventh Amendment to the Constitution of the United States and the Federal Water Quality Improvement Act of 1970, Title 33 U.S.C.

1. (e) Plaintiff is the owner of an oil barge which, when being pushed-towed on a canal leading into Lake Champlain, New York, grounded and was caused to spill oil. At the cost of $152,500.00 it removed the oil and filed a claim in the Court of Claims against the United States for reimbursement thereof under said Water Quality Improvement Act.

The government, alleging its ownership of the tow, impleaded petitioners herein, who, after answer, moved to

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dismiss the impleading petition. The government then moved for summary judgment dismissing plaintiff's petition and also moved to defer action on petitioners' said motion to dismiss which, over objection, was granted, after which petitioners cross-moved for summary judgment dismissing plaintiff's petition.

The Court of Claims granted the government's motion for summary judgment because in the case of *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F.Supp. 110, affirmed 487 F. 2d 1393 (2nd Cir. 1973), cert. den., 417 U.S. 976 (1974), the Court of Claims held, there was a finding by the District Court which created a collateral estoppel against plaintiff's claim herein. On the basis of dismissal of plaintiff's petition the Court of Claims granted summary judgment to petitioners herein dismissing plaintiff's petition. Also, on the basis of dismissal of plaintiff's petition the Court of Claims dismissed the government's impleading petition.

1. (g) Jurisdiction of the Court of Claims is based on 33 U.S.C. Sec. 1161(i)(l).

1. (h) Petitioners are uncertain whether they must petition for certiorari herein. Supreme Court Rules 23 & 24, unlike Appellate Rule 4(a) do not allow for "Cross-petitions" for certiorari, but only opposing briefs. While there is precedent in lower courts that an appellee may argue a point other than that on which the lower court relied to sustain judgment below without having cross-appealed, even though it is satisfied with the net effect of the judgment below, *General Instrument Corp.* v. *United States*, 462 F. 2d 1156, 1160, still, in *Morley Construction Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191, 57 S. Ct. 325, 81 L. Ed. 593, 597, it is stated that an appellee without a cross-appeal may not " 'attack the decree with a view either to enlarging his own rights there-

under or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below' . . . The rule is inveterate and certain." Cf. also *Smith* v. *Boise City, Idaho,* 9th Cir., 104 F. 2d 933.

Petitioners herein contend that the Court of Claims has deviated from the usual course of proceedings in judicial proceedings wherein the federal courts, being courts of limited statutory jurisdiction, when there is no dispute as to the facts, make jurisdictional determinations unequivocally, at any stage of the proceedings.

Here if the Court of Claims is reversed, presumably the impleading petition will be reinstated.

It has always been the contention of petitioners herein that the Court of Claims is a statutory court, 28 U.S.C.A. Sec. 171 of limited jurisdiction, the purpose of which is to award damages against the government in non-tort actions. 28 U.S.C.A. Sec. 1491; *Glidden Company* v. *Zdanck,* 370 U.S. 530, 556, 82 S. Ct. 1459, 1476, 8 L. Ed. 2d 671, 691; *Clark* v. *United States,* 461 F. 2d 781, cert. den. 409 U.S. 1028.

While the Federal Water Quality Improvement Act, Title 33 U.S.C. creates such jurisdiction against the United States, the government, availing itself of Rule 41(e) and (f) of the Court of Claims, and attempting to use it like Rule 14 of the Federal Rules of Civil Procedure, would make the government a claimant in tort.

The net result, among other things, would be to deprive petitioners of their right to a jury trial under the Seventh Amendment to the Constitution of the United States.

Said Water Quality Improvement Act does provide for third-party liability to the United States for the costs

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of removal of oil "in any court of competent jurisdiction", 33 U.S.C. Sec. 1161(g), but the Court of Claims would not be such a court.

The Court of Claims itself has decided that its rules may not go beyond its Congressional jurisdiction, *Rolls-Royce Limited, Derby, England* v. *United States,* 364 F. 2d 415.

Petitioners herein further contend that whether or not the cited case of *United States* v. *Ira S. Bushey & Sons, Inc., supra,* constitutes collateral estoppel as to plaintiff in its claim against the government, it is conclusive as to the non-liability of petitioners herein. As to them there was a specific finding that somebody else, i.e., the *Blue Line 107,* push towed by the tug *Seneca,* caused the oil spill. There was no alternative to that specific finding, nor was there anything equivocal about it.

On the other hand, regarding plaintiff vis-a-vis the government, the Court of Claims admitted that such a finding was cumulative. By its definition, in law, that which is cumulative is that which "tends" to prove a point. Webster's New Collegiate Dictionary.

For the equitable purposes of the injunction in *United States* v. *Ira S. Bushey & Sons, Inc., supra,* it could be that control by Ira S. Bushey & Sons, Inc. over plaintiff herein "tended" to prove the right to the relief sought against Bushey. Whether it "tended" to prove that, by reason of such control, plaintiff herein is ousted of any right under the Water Quality Improvement Act is questionable, at least on a motion for summary judgment.

Plaintiff's position is akin to the concept of residence for tax, voting and service of process. The one may or may not embrace the other.

It is submitted that the statute is too new to have been so tested on a motion for summary judgment such as that made by the government.

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Claims

This decision is the same as the one appended to the Petition for A Writ of Certiorari filed heretofore by Petitioner, Tanker Hygrade No. 18, Inc.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1331

CLAYTON P. KEHOE TOWING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-1332

TANKER HYGRADE NO. 18, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-18a)[1] is reported at 526 F. 2d 805.

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[1]References to "Pet." and "Pet. App." are to the petition and appendix in No. 75-1332.

JURISDICTION

The judgment of the Court of Claims was entered on December 17, 1975. The petitions for a writ of certiorari were filed on March 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly determined that the doctrine of collateral estoppel prevented petitioner Tanker Hygrade No. 18, Inc., from recovering from the United States in this action the costs incurred by it in removing oil spilled in a navigable waterway of the United States.

STATEMENT

In September, 1972, the barge HYGRADE NO. 18, a non self-propelled vessel owned by petitioner Tanker Hygrade No. 18, Inc., a subsidiary of Ira S. Bushey & Sons, Inc., was being pushed by the tug JOAN KEHOE, owned by petitioners Clayton P. Kehoe Towing Co., Inc., and Martin J. Kehoe Towing Co., Inc. The barge was en route from Rensselaer, New York, to Ticonderoga, New York, with a cargo of No. 6 fuel oil (Pet. App. 2a-3a). At about 11:45 P.M., HYGRADE NO. 18 struck a rock formation at the bank of the New York State Barge Canal while attempting to pass an approaching barge, BLUE LINE NO. 107, being pushed by the tug SENECA, both of which are also owned by subsidiaries of Ira S. Bushey & Sons, Inc. (Pet. App. 3a, 7a). As a result of the collision, HYGRADE NO. 18 discharged a considerable amount of her cargo of fuel into the canal and Lake Champlain. Petitioner Tanker Hygrade No. 18, Inc., removed the oil from the canal and lake at a cost of $152,500 (Pet. App. 3a).

Prior to the collision, the United States had brought suit against Ira S. Bushey & Sons, Inc., in the United

States District Court for the District of Vermont under the Refuse Act, 30 Stat. 1152, 33 U.S.C. 407. The United States contended in that suit that injunctive relief was needed to prevent Bushey and its wholly-owned subsidiaries from continuing to spill oil into Lake Champlain. Subsequent to the collision, the United States amended its complaint in the case to allege that that collision had been caused by the negligence of the crews of the Bushey-owned SENECA and BLUE LINE NO. 107.

Following a non-jury trial, the district court found that the captain of the SENECA had caused the collision by disregarding an agreement to hold back to an area wide enough for the vessels to pass one another safely and by failing to respond to a radio warning of the impending collision. The court further found that the collision had damaged the barge HYGRADE NO. 18 and caused her to spill oil into the New York State Barge Canal and Lake Champlain. The court concluded that "the continuation of slack operations" by Bushey and its wholly-owned subsidiaries and "the damaging effects of oil spills" constituted "a continuing threat of irreparable harm to the navigable waters of the United States." It therefore entered broad injunctive relief against Bushey. *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 119, 122-123 (D. Vt.), affirmed without opinion, 487 F. 2d 1393 (C.A. 2), certiorari denied, 417 U.S. 976.

Petitioner Tanker Hygrade No. 18, Inc., which is still owned by Bushey, subsequently commenced this action against the United States under the Water Quality Improvement Act of 1970, 84 Stat. 91, 96, 33 U.S.C. 1161(i)(1), to recover the $152,500 it had expended to remove the oil discharged on September 30, 1972, from HYGRADE NO. 18 (Pet. 3). The United States, which was entitled under 33 U.S.C. 1161(g) to bring an action against any third party whose willful negligence or willful misconduct

contributed to the oil spill, impleaded the owners of the JOAN KEHOE (petitioners Clayton P. Kehoe Towing Co., Inc., and Martin J. Kehoe Towing Co., Inc.) as well as the owners of the SENECA and BLUE LINE NO. 107 (subsidiaries of Bushey).

After petitioner Tanker Hygrade No. 18, Inc., filed a pretrial submission alleging that the oil spill of September 30, 1972, was caused solely by the negligence of either the JOAN KEHOE or the SENECA, the United States moved for summary judgment on the ground that the District Court for the District of Vermont had already found in litigation involving the parties that the oil spill had been caused by the negligence of the SENECA and BLUE LINE NO. 107, both owned by subsidiaries of Bushey, so that Bushey-owned petitioner Tanker Hygrade No. 18, Inc., was estopped from claiming that the oil spill was caused "solely by * * * an act or omission of a third party"—a prerequisite under 33 U.S.C. 1161(i)(1) to its recovery from the United States of the expenses incurred by it in removing the oil (Pet. 3-4).

In granting the motion for summary judgment filed by the United States, the Court of Claims held that the district court had necessarily found in *United States* v. *Ira S. Bushey & Sons, Inc.*, *supra*, that the collision and consequent oil spill had been caused by the negligence of the vessels owned by Bushey subsidiaries and that that finding had been essential to its ultimate conclusion that "slack operations by the Bushey organizations" posed "a continuing threat of irreparable harm to the navigable waters of the United States" (Pet. App. 16a). Accordingly, the Court of Claims concluded that petitioner Tanker Hygrade No. 18, Inc., was collaterally estopped from relitigating the cause of the collision and dismissed the suit (Pet. App. 18a). Having dismissed the suit, the Court of Claims dismissed the impleading petition as well (*ibid.*).

ARGUMENT

The Court of Claims' decision in this case represents simply the application of settled legal principles to a particular set of facts. The court's decision is, moreover, correct. Consequently, further review by this Court is not warranted.

1. The doctrine of collateral estoppel prevents a party from relitigating a matter finally and necessarily determined in prior litigation involving that party. See *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593. In *United States* v. *Ira S. Bushey and Sons, Inc.*, *supra*, the character and extent of oil spills caused by Bushey and its subsidiaries were matters necessarily resolved by the court prior to granting the government's request for injunctive relief (see, *e.g.*, *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633), and the "recurring nature" of those spills was specifically cited by the district court to support both its decision to grant and its efforts to fashion appropriate injunctive relief (363 F. Supp. at 121). The district court's finding in the *Bushey* case that Bushey subsidiaries caused the oil spill of September 30, 1972, was thus essential to its judgment, and the Court of Claims correctly applied the doctrine of collateral estoppel to that finding.

Contrary to the contention of petitioner Tanker Hygrade No. 18, Inc. (Pet. 12-13), the Court of Claims' decision in this case does not conflict with *Halpern* v. *Schwartz*, 426 F. 2d 102 (C.A. 2). The Second Circuit held in *Halpern* that where a district court relied on three independent, alternative legal bases for rendering a judgment denying a discharge in bankruptcy, the judgment was not conclusive as to the facts found to support only one of those bases. But the court's judgment in the *Bushey* case rested upon only one basis—the conclusion that past oil spills and the "continuation of slack operations" by Bushey-owned companies posed "a continuing threat of irreparable harm to

the navigable waters of the United States and hence to the plaintiff" (Pet. App. 15a). The court's findings of fact in support of that conclusion, including the finding that Bushey companies were responsible for the oil spill of September 30, 1972, were essential to the court's judgment, and the judgment is therefore conclusive as to those facts.

2. Petitioner Tanker Hygrade No. 18, Inc., also contends (Pet. 6) that the Court of Claims erred in disregarding the fact that each of the Bushey wholly-owned subsidiaries involved in this case is a separately-incorporated entity. But the court did no more than apply to the particular facts of this case the settled doctrine that "the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy" (*Bangor Punta Operations* v. *Bangor & A.R. Co.*, 417 U.S. 703, 713). At base, this case involves an effort on the part of one Bushey company (Petitioner Tanker Hygrade No. 18, Inc.) to shift the burden of paying for the negligence of other Bushey companies to the United States, on the theory that the Bushey companies are independent entities. In these circumstances, the Court of Claims was fully justified in piercing the corporate veil to prevent an improper shifting of liability.

3. The petition in No. 75-1331 would become moot if the petition in No. 75-1332 were denied. But the petition in No. 75-1331 should be denied in any event, because petitioners there seek merely to advance alternative grounds—not considered by the court below—for the dismissal of the impleading petition against them.[2] In

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[2]Petitioners in No. 75-1331, the owners of the JOAN KEHOE, contend that the government was not entitled to implead them in the Court of Claims because to do so would deprive them of their "right to a jury trial under the Seventh Amendment to the Constitution of the United States" (Pet. in No. 75-1331, at 4).

the event the petition in No. 75-1332 is granted, and the court's decision dismissing the action against the United States is reversed, the impleading petition filed on behalf of the United States would—as petitioners in No. 75-1331 acknowledge (Pet. 4)—presumably be reinstated. See *Bowser, Inc.* v. *United States and General Steel Tank Co.*, 190 Ct. Cl. 441, 420 F. 2d 1057. Petitioners in No. 75-1331 will have ample opportunity at that time to press the alternative grounds for dismissal of the impleading petition discussed in their petition to this Court, with the usual opportunity for appellate review thereafter.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

DOJ-1976-05